

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**207 GENESEE STREET**  
**UTICA, NEW YORK 13501**

**In the Matter**

**- of -**

**the Application of Neversink Steel Corp. dba Liberty Iron Works  
for Recertification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 3655**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**December 6, 2024**

This matter considers the written appeal by Neversink Steel Corp. dba Liberty Iron Works (“Neversink” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for recertification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On August 15, 2023, Ms. Barbara Siegel, as President, applied on behalf of Neversink for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On December 7, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4);
  - (b) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
  - (c) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2); and

(d) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1).

3. Neversink timely filed a Request to Appeal on January 3, 2024 (DED Exhibit 3).
4. A notice to proceed via written appeal was sent to Neversink on January 10, 2024 (DED Exhibit 4).
5. Neversink filed its written appeal by letter dated February 2, 2024, from its attorney, Marvin Newberg, Esq. (APP Exhibit A).
6. By letter dated September 27, 2024, Attorney Newberg requested that documents previously submitted to counsel for the Division as part of settlement negotiations be considered. (APP Exhibit B).
7. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated October 29, 2024, and a brief of Anequa Pond Esq., counsel for the Division, dated October 30, 2024.

### **FINDINGS OF FACT**

8. Neversink is engaged in the business of providing steel work, crane service, miscellaneous iron, railings, and fire escapes (DED Exhibit 1).
9. Ms. Barbara Siegel is President and has a 66% ownership interest. Mr. Joseph Siegel is Vice President and has a 15.5% ownership interest. Mr. Steven Siegel is a laborer and has an 11% ownership interest. Ms. Barbara Schmidt is the Office Manager and has a 7.5% ownership interest (DED Exhibit 1).

10. Article III, Section 1 of the Bylaws states “Subject to any provision in the certificate of incorporation, the business of the corporation shall be managed by its board of directors...” Article III, Section 7 of the Bylaws states “... a majority of the entire board shall constitute a quorum for the transaction of business...” Article III, Section 8 of the Bylaws states “Unless otherwise required by law, the vote of a majority of the directors present at the time of the vote, if a quorum is present at such time, shall be the act of the Board. Each director present shall have one vote regardless of the number of shares, if any, which he may hold.” (DED Exhibit 13).
11. The directors of Neversink are Ms. Barbara Siegel, Mr. Joseph Siegel, Mr. Steven Siegel, and Ms. Barbara Schmidt (DED Exhibit 14).
12. Article VI of the Bylaws states “...dividends on the outstanding shares of the corporation may be declared in such amounts and at such time or times as the board may determine. Before payment of any dividend, there may be set aside out of the net profits of the corporation available for dividends such sum or sums as the board from time to time in its absolute discretion deems proper as a reserve fund to meet contingencies...and the board may modify or abolish any such reserve.” (DED Exhibit 13).
13. The critical functions of the business are steelwork, welding, crane service, miscellaneous iron, railing, and fire escapes (DED Exhibit 1).
14. Ms. Siegel’s resume reflects that she graduated high school in 1959 and has been President of Neversink since 1960. Her job functions include “oversees and implements every duty pertaining to the company including estimating jobs, contracts, jobsite inspection, customer service, daily invoicing, maintains a budget, financing, oversees and directs all company personnel, overall management.” (DED Exhibit 5).

15. Mr. Joseph Siegel and Mr. Steven Siegel each hold a New York State Crane Operator Certificate of Competence, and each performs welding, crane operation and metal fabrication duties. Steven Siegel has been a laborer with the business since 1996 and is OSHA Certified. Joseph Siegel has been the company's Vice President since 1981 and is also OSHA Certified. (DED Exhibits 6, 7, 8 and 9).

16. Invoices and contracts submitted with the Application show that Neversink has been contracted to fabricate and install beams; reinforce steel bar joints; fabricate railings; structural steel work; and change angles on large pipes. (DED Exhibits 11 and 12).

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

5 NYCRR §144.2(c) states in relevant part as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
  - (i) The products or services the business enterprise provides to clients; and
  - (ii) The means by which the business enterprise obtains contracts or orders.

5 NYCRR §144.2(d)(1) states as follows:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Neversink for recertification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. By letter dated September 27, 2024, Attorney Newberg requested that documents previously submitted to counsel for the Division as part of settlement negotiations be considered. (APP Exhibit B). This is new evidence and will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

## DISCUSSION

### I. Prior Certification

The Division acknowledges that Neversink was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify Neversink based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, Neversink had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the August 15, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

### II. Ownership

NYCRR §144.2(b)(4) requires that the woman-owner must not be encumbered in her ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interest. See *Matter of FIS Blue, Inc.*, Recommended Order dated February 1, 2024, Final Order 24-02 dated May 7, 2024 (“FIS is managed by the Board of Directors. The Board determines the duties and authority of all officers. The President is

subject to the Board's control. Therefore, the [woman relied upon for certification] does not control the Board.”).

Article III, Section 1 of the Bylaws states “Subject to any provision in the certificate of incorporation, the business of the corporation shall be managed by its board of directors...” Article III, Section 8 of the Bylaws states “Unless otherwise required by law, the vote of a majority of the directors present at the time of the vote, if a quorum is present at such time, shall be the act of the Board. Each director present shall have one vote regardless of the number of shares, if any, which he may hold.” (DED Exhibit 13).

The directors of Neversink are Ms. Barbara Siegel, Mr. Joseph Siegel, Mr. Steven Siegel and Ms. Barbara Schmidt (DED Exhibit 14).

Article VI of the Bylaws states “...dividends on the outstanding shares of the corporation may be declared in such amounts and at such time or times as the board may determine. Before payment of any dividend, there may be set aside out of the net profits of the corporation available for dividends such sum or sums as the board from time to time in its absolute discretion deems proper as a reserve fund to meet contingencies...and the board may modify or abolish any such reserve.” (DED Exhibit 13).

Neversink is managed and controlled by the Board of Directors. In order to transact business, a majority of the Board of Directors must be present in order to constitute a quorum. Therefore, Ms. Siegel needs at least two other directors to transact business. The Board controls the dividend payout policy for the business. As stated in the Division's brief “Since dividends provide shareholders with a return on their investments, it is a benefit of ownership which is encumbered because the Bylaws provide that the Board controls, not Ms. Siegel.” Therefore, the



Board has control over the dividends of the shareholders and Ms. Siegel is encumbered in her ability to realize the benefits of her ownership (DED Exhibit 9).

The Division's determination to deny the application on the basis that Neversink failed to demonstrate that Ms. Siegel is not encumbered in her ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating such ownership interest, as required under 5 NYCRR §144.2(b)(4), is supported by substantial evidence.

### III. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that "this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things". In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Siegel does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business' critical functions of steelwork, welding, crane service, miscellaneous iron, railing, and fire escapes (DED Exhibit 1). Ms. Siegel's resume reflects that she graduated high school in 1959 and has been President of Neversink since 1960. There is no reference to any academic credentials or licensing, or certification obtained by Ms. Siegel. Her job functions include "oversees and implements every duty pertaining to the company including estimating jobs, contracts, jobsite inspection, customer service, daily invoicing, maintains a budget, financing, oversees and directs all company personnel, overall management." (DED Exhibit 5).

Ms. Siegel's resume reflects that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 5).

Mr. Joseph Siegel and Mr. Steven Siegel each hold a New York State Crane Operator Certificate of Competence, and each performs welding, crane operation and metal fabrication duties. Steven Siegel has been a laborer with the business since 1996 and is OSHA Certified. Joseph Siegel has been the company's Vice President since 1981 and is also OSHA Certified. (DED Exhibits 6, 7, 8 and 9).

Applicant argues on appeal that "Barbara Siegel has been running and operating and controlling the operation of Neversink Steel for some 44 years... These 44 years of invaluable experience and knowledge of the business and industry cannot be summarily discarded by an unsupported determination of the Division." (APP Exhibit A). However, having knowledge of the business and industry does not equate to competency in the critical functions of the business without relying upon others, including Steven Siegel and Joseph Siegel, who have the licensure and training required to perform the work. Invoices and contracts submitted with the Application show that Neversink has been contracted to fabricate and install beams; reinforce steel bar joints; fabricate railings; structural steel work; and change angles on large pipes. (DED Exhibits 11 and 12). There is nothing in the Application or supporting documents showing that Ms. Siegel has the experience or competence to oversee and inspect the work performed by Neversink. (DED Exhibit 1).

5 NYCRR §144.2(c)(2) states that "... women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be

determined by the division based upon the following factors but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders”.

The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4<sup>th</sup> Dept. 2018).

The critical functions of the business are steelwork, welding, crane service, miscellaneous iron, railing, and fire escapes (DED Exhibit 1). Ms. Siegel does not have the required license, academic credentials, training, or direct work experience in steel work, crane service, miscellaneous iron, railings and fire escapes. She therefore needs to rely on Steven Siegel and Joseph Siegel to perform the critical functions of the business. (DED Exhibits 5, 6, 7, 8 and 9).

The application states that Steven Siegel, Joseph Siegel, Hunter Siegel and Wayne Miller share responsibility for fabrication and installation of metal structures. Ms. Siegel shares marketing and sales; estimating; preparing bids; negotiating insurance; supervising field operations; purchasing equipment/sales; managing/signing payroll; and being the signatory for the business accounts with the other owners of the business (DED Exhibit 1). Sharing these responsibilities demonstrates that Ms. Siegel does not control the business operations. Also, she lacks the academic credentials, licensure or direct work experience to be able to perform or oversee the work. Steven Siegel and Joseph Siegel, and other employees are responsible for the core revenue-generating functions of Neversink.

The Division’s determination to deny the application on the basis that Neversink failed to demonstrate that Ms. Siegel possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1),

and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2). is supported by substantial evidence.

#### IV. Control

The Division also denied certification on the ground that Ms. Siegel is not the highest-ranking officer or control the Board of Directors, as required under NYCRR §144.2(d)(1).

Article III, Section 1 of the Bylaws states “Subject to any provision in the certificate of incorporation, the business of the corporation shall be managed by its board of directors...” Article III, Section 7 of the Bylaws states “... a majority of the entire board shall constitute a quorum for the transaction of business...” Article III, Section 8 of the Bylaws states “Unless otherwise required by law, the vote of a majority of the directors present at the time of the vote, if a quorum is present at such time, shall be the act of the Board. Each director present shall have one vote regardless of the number of shares, if any, which he may hold.” (DED Exhibit 13).

The directors of Neversink are Ms. Barbara Siegel, Mr. Joseph Siegel, Mr. Steven Siegel and Ms. Barbara Schmidt (DED Exhibit 14).

Since the Board manages the business of Neversink, and a quorum of Board members is required to transact business, Ms. Siegel cannot act without the concurrence of at least two other Board members. Therefore, Ms. Siegel does not individually control the Board of Directors.

Applicant argues on appeal that “...as the majority shareholder, the majority woman can, on her own, call a shareholders meeting and remove the entire Board of Directors and install herself as the sole Director should she so choose if she disagrees with an action of the Board of Directors.” (APP Exhibit A). However, applicant’s claim that she is in control of the Board of Directors are insufficient to overcome the actual wording of the Bylaws. Also, Article III, Section 2 of the Bylaws states “The number of directors shall be one. When all of the shares are owned by less than

three shareholders, the number of Directors may be less than three but not less than the number of shareholders.” (DED Exhibit 13). In this case, there are four shareholders and therefore there needs to be at least four Directors.

The Division’s determination to deny the application on the basis that Neversink failed to demonstrate that Ms. Siegel controls the board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

### **CONCLUSION**

Neversink did not meet its burden to demonstrate that the Division’s determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(4), 144.2(c)(1), 144.2(c)(2) and 144.2(d)(1), was not based on substantial evidence.

### **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director affirm the Division’s determination to deny Neversink’s application for recertification as a woman-owned business enterprise.

In the Matter of Neversink Steel Corp. dba Liberty Iron Works  
DED File ID No. 3655  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Submission	Y	Y
APP B	Attorney Newberg letter dated 9/27/24	Y	N
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Barbara Siegel Resume	Y	Y
DED 6	Joseph Siegel Crane Operator Certificate of Competence	Y	Y
DED 7	Steven Siegel Crane Operator Certificate of Competence	Y	Y
DED 8	Joseph Siegel Resume	Y	Y
DED 9	Steven Siegel Resume	Y	Y
DED 10	Barbara Schmidt Resume	Y	Y
DED 11	Invoices	Y	Y
DED 12	Barone Construction Group Contract	Y	Y
DED 13	Appellant's Bylaws	Y	Y
DED 14	2023 Annual Meeting Minutes	Y	Y